

87-1676  
No. 1676

Supreme Court, U.S.

~~FILE~~ D

APR 11 1988

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

HARRY I. SAUL, and JULIAN D. SAUL,  
as Co-Executors of the Estate of  
Helen M. Saul,

Petitioners,

V.

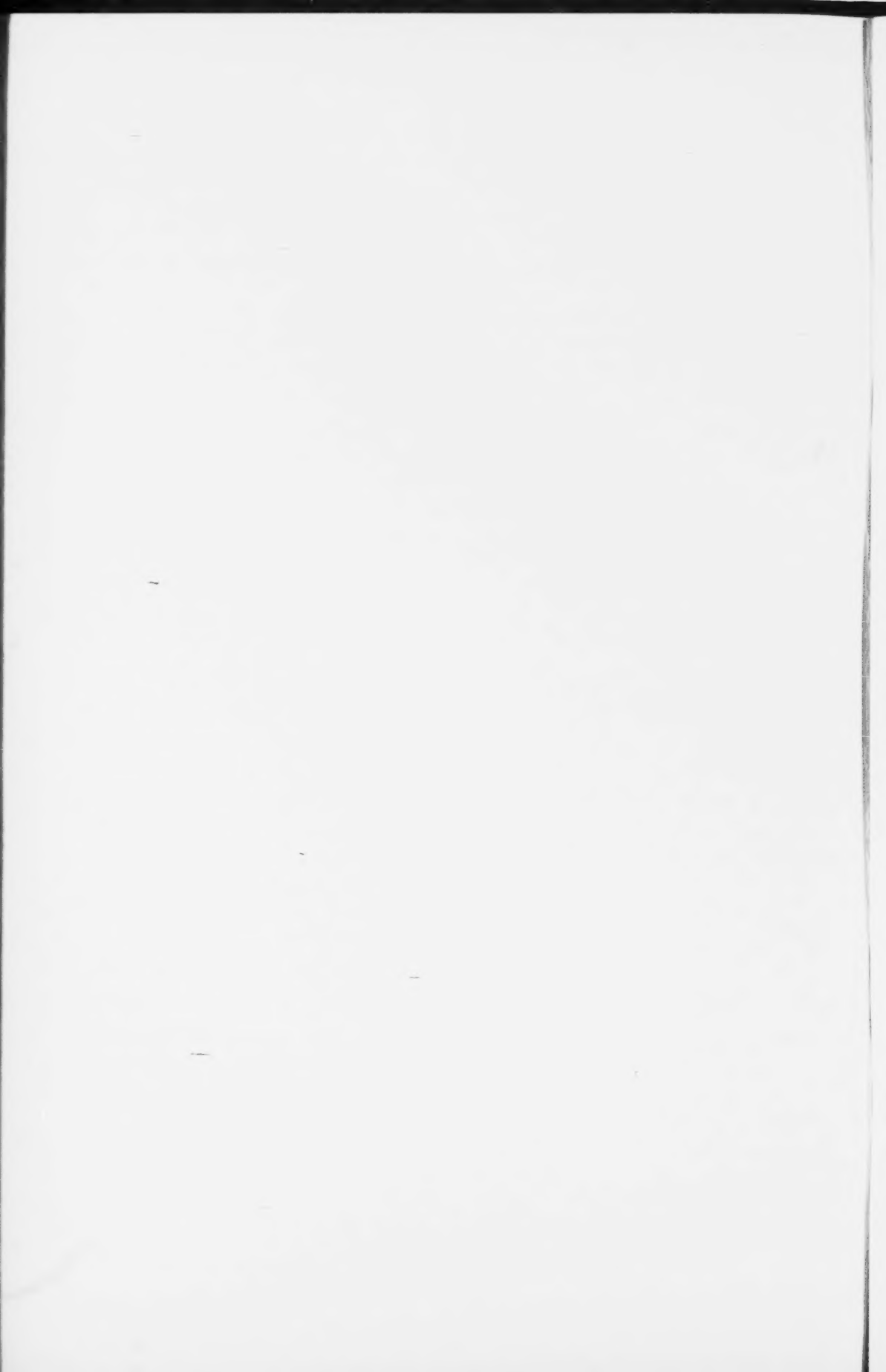
THE UNITED STATES OF AMERICA,

Respondent

**WRIT OF CERTIORARI  
TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT  
PETITION FOR CERTIORARI**

L. Hugh Kemp  
KINNEY, KEMP, PICKELL,  
SPONCLER & JOINER  
P.O. Box 398  
Dalton, Georgia 30720  
(404) 278-5211

Attorney for Petitioners



## QUESTIONS PRESENTED

1. Should the Supreme Court of the United States resolve the existing conflict between the Eleventh Circuit Court of Appeals on the one hand and the First, Fifth and perhaps the Tenth Circuit Court of Appeals as to the meaning of the phrase "position of the United States in the civil proceeding" under 26 U.S.C. § 7430(c)(2)(A)?
2. Were the petitioners denied due process of law by the failure of the District Court to make findings of fact and conclusions of law in its interpretation of § 7430, and the refusal of the Court of Appeals to consider the merits of petitioners' case in that the Court of Appeals affirmed the District Court *per curiam* without reciting any authority therefor, or discussing the facts or the law?
3. Was the position of the United States denying that the gemstones contributed by the Petitioner to the Smithsonian Institute had any value or in failing to obtain a specific valuation from an expert until a week before the trial unreasonable under the terms of Section 7430(c)(2)(A), thereby entitling Petitioners to have the District Court consider an award of attorney's fees pursuant to said Section?

**LIST OF ALL PARTIES**

Harry I. Saul and Julian D. Saul,  
as Co-Executors of the Estate of Helen M. Saul,  
and  
the United States of America

# TABLE OF CONTENTS

	Page
Questions Presented .....	i
List of All Parties .....	ii
Table of Contents .....	iii
Table of Authorities .....	v
Reference to Opinion of the Eleventh Circuit Court of Appeals .....	1
Jurisdictional Statement .....	1
Statutes Involved .....	1
Statement of Material Fact .....	1
Proceeding in the Court Below .....	4
Statement of Jurisdiction in the Court of Appeals .....	5
Reasons for granting the Petition .....	5
Argument and Citation of Authority .....	7
Conclusion .....	15
Appendix	

## APPENDIX A

Copy of Order of United States District  
Court, for the Northern District of Georgia ..... 1A

## TABLE OF CONTENTS (Continued)

Page

## Appendix (Continued)

## APPENDIX B

Copy of Per Curiam Opinion of the Court of Appeals .....	5A
--	----

## APPENDIX C

Order Denying Motion for Rehearing and Motion for Rehearing En Banc .....	7A
---	----

## APPENDIX D

Statutes .....	9A
----------------	----

26 U.S.C. §170 .....	9A
----------------------	----

26 U.S.C. §7430 .....	11A
-----------------------	-----

## APPENDIX E

Complaint .....	13A
-----------------	-----

## APPENDIX F

Answer .....	17A
--------------	-----

## APPENDIX G

Stipulation of the Parties .....	21A
----------------------------------	-----

## TABLE OF AUTHORITIES

Cases	Pages
<i>Ashburn v. United States</i> , 740 F.2d 843 (11th Cir., 1984) .....	11
<i>Baker v. Commissioner</i> , 787 F.2d 637 (D.C. Cir., 1986) .....	10, 11, 13, 14
<i>Baker v. United States</i> , 825 F.2d 1262 (8th Cir., 1987) .....	8
<i>Don Casey Co.</i> , 87 T.C.54 (19 ) .....	15
<i>DeWitt v. United States</i> , (204 Ct. Cl. 274) .....	14
<i>Edison v. United States</i> , (53 AFTR2d 84-841) .....	11
<i>Ewing and Thomas, P. A. v. Heye</i> , 803 F.2d 613 (11th Cir., 1986) .....	5, 6, 8 10, 15
<i>Kaufman v. Egger</i> , 758 F.2d 1 (1st Cir., 1985) ....	5, 13, 14
<i>Lindt v. United States</i> , (58 AFTR2d 86-6189) .....	14
<i>Plowmann v. United States</i> , 659 F.Supp. 34 (W.D. Okl., 1986) .....	5
<i>Powell v. Commissioner</i> , 791 F.2d 385 (5th Cir., 1986) .....	5, 10
<i>William A. Saba</i> , (¶ 80 P-H T.C. Memo 80-199) .....	14

## TABLE OF AUTHORITIES (Continued)

## Pages

## Cases

<i>United States v. Balanced Financial Management</i> , 769 F.2d 1440 (10th Cir., 1985) .....	10, 11
<i>Zielinski v. United States</i> , (54 AFTR2d 84-5132) .....	11

## Other Authorities

Black's Law Dictionary .....	11
1982 U.S. Code Cong. & Ad. News 1190, A50 .....	11



## **Reference to Opinion of the Eleventh Circuit Court of Appeals**

The Court of Appeals for the Eleventh Circuit issued a *per curiam* affirmance and *per curiam* denial of the motion for rehearing and rehearing *en banc* which are not published, copies of which are contained in the appendix.

## **Jurisdictional Statement**

On December 7, 1987, the Eleventh Circuit Court of Appeals affirmed *per curiam* without publication the decision of the United States District Court for the Northern District of Georgia, and on January 19, 1988, denied the motion for rehearing and for a hearing *en banc*.

## **Statutes Involved**

The Supreme Court of the United States has jurisdiction over this Petition and this case because the case involves a statute enacted by the United States Congress and under 28 U.S.C. §2101(c) in that this is an application for writ of certiorari intended to bring the judgment of the United States Court of Appeals for the Eleventh Circuit before this Court and the same has been applied for pursuant to said code section, and Rule 15(f) of the statute involved, and involves the interpretation of the Internal Revenue Code of 1954 (26 U.S.C. §§170 and 7430), the relevant parts of which are set forth in the Appendix.

## **Statement of Material Facts.**

In 1978, Petitioners donated several gemstones of very high quality to the Smithsonian Institute. Pursuant to Section 170 of the Code, Petitioners claimed a deduction in 1978 and 1979 in an amount equal to the appraised fair market value at the time of donation.

In October, 1981, Petitioners received a letter from the Internal Revenue Service wherein it was asserted that taxes paid for the years 1978 and 1979 were deficient by \$26,013.71 and \$15,765.03, respectively. The government asserted that because the taxpayers made the donation in anticipation of receiving an economic benefit greater than the value of the items transferred no deduction would be allowed under Section 170 of the Code because the taxpayers lacked "requisite charitable intent." The Respondent, prior to December 2, 1986, never even concerned itself with the fair market value of the gems at the time of the donation. The Respondent considered the selling price of the gemstones in 1977, not December of 1978, the date of the contribution.

Taxpayers filed a protest with the appellate officer of the Internal Revenue Service. The protest was denied and a notice of deficiency was sent to taxpayers. In the notice the government maintained its earlier position that the transfer of gems was not a charitable contribution or gift under Section 170 of the Code because the taxpayers lacked the requisite "charitable intent." Additionally, the notice stated that taxpayers had failed to establish the fair market value of the gemstones.

Thereafter, the Petitioners filed their claim for a refund with the United States District Court for the Northern District of Georgia on November 4, 1985. The Complaint asserted that taxpayers had met the requirements of Section 170 of the Code and they were entitled to a refund for assessments levied against them.

The government filed its Answer reasserting the pre-litigation position taken by the Internal Revenue Service that the "purported charitable contributions" made by the taxpayers were not deductible pursuant to Section 170 of the Code (paragraph 9).

A Consolidated Pretrial Order was entered wherein the government maintained its position challenging the validity of charitable deductions under Section 170 of the Code. Paragraph 15 of said Pretrial Order sets forth two issues; (1) whether the purported contributions were charitable gifts under Section 170, and (2) if they were charitable gifts, was the fair market value the amount claimed by taxpayers (R1-8-5: paragraph 15).

The taxpayers contributed twenty stones to The Smithsonian Institute. The government in its RAR only examined eleven different types of stones, and expressed an opinion as to the selling price in 1977 (RAR at page 15). The government contacted its expert witness in February, 1986, regarding the value of gems (R4-232). The government's expert was not asked to view the the stones until the summer of 1986 (R4-232). He first viewed the stones in November, 1986 (R4-232), and completed his appraisal on December 2, 1986 (R4-234).

On the date the case was scheduled for trial, December 8, 1986, the government by stipulation conceded the question of taxpayers' charitable intent, thereby admitting that the taxpayer was entitled to a charitable deduction pursuant to Section 170 of the Code. This concession left for trial only the question of fair market value of the gems on the date of the contribution. At trial, taxpayer prevailed and received a special verdict valuing the gems at the exact amount originally claimed on their income tax return.

Taxpayer then requested attorneys fees and other costs to be awarded pursuant to Section 7430. The requested court costs were awarded by the District Court; but attorney's fees were denied. The District Court only found that the government's position as to the value was not unreasonable as required by Section 7430(c)(2), but the District Court never

considered the issue of the reasonableness of the defense of donative intent. Additionally, the District Court denied the government's motion for J.N.O.V. or in the alternative a new trial.

The government then filed an appeal from the final judgment, and taxpayers filed a cross-appeal from the denial of attorneys fees. The government dismissed its appeal. Taxpayers proceeded with their cross-appeal from the denial of attorney's fees.

#### **Proceedings in the Court Below.**

At trial, taxpayers prevailed and received a verdict and judgment valuing the gems at the amount originally claimed. The District Court then denied Petitioners' request for attorneys fees pursuant to Section 7430. The District Court's Order failed to consider the taxpayers' position that the government was unreasonable in its adherence to the defense of "no donative intent." In regard to the issues of valuation, the Court's opinion stated:

While agreeing that plaintiff did receive a jury verdict in his favor in this case, the Court is unwilling to hold that the defendant's position was unreasonable. Specifically, the Court concludes that it was for the jury to decide the value of the jewels. The defendant's contention that the jewels had a value substantially less than what the plaintiff claimed was not unreasonable. The fact that the jury chose to find in plaintiff's favor does not ipso facto mean that defendant's position was unreasonable. Therefore, the Court will DENY plaintiff's request that he be awarded reasonable litigation costs.

Additionally, the District Court denied the Respondent's motion for a J.N.O.V. or in the alternative a new trial. The government filed a notice of appeal from this Order and the taxpayer filed a cross appeal to the Court's Order denying the request for attorney's fees. The government filed a dismissal of its appeal with prejudice, but the cross appeal was decided by the Court of Appeals adversely to the taxpayer in a per curiam opinion.

### STATEMENT OF JURISDICTION IN THE COURT OF APPEALS

The basis of federal jurisdiction is that this case involves a suit for a tax refund and interpretation of federal statutes of 26 U.S.C. §§ 170 and 7430, and a clear conflict as to the meaning of Section 7430 by the Eleventh Circuit Court of Appeals in the case of *Ewing & Thomas v. Heye*, 803 F.2d 613 (11th Cir., 1986), and the First Circuit Court of Appeals in *Kaufman v. Egger*, 758 F.2d 1 (1st Cir., 1985), and the Fifth Circuit Court of Appeals in *Powell v. Commissioner*, 791 F.2d 385 (5th Cir., 1981).

### Reasons for Granting the Petition.

This case presents to the Supreme Court an opportunity to resolve the clear conflicts between the Eleventh Circuit Court of Appeals on the one hand, and the First Circuit, *Kaufman v. Egger*, 758 F.2d 1 (1st Cir., 1985), the Fifth Circuit, *Powell v. Commissioner*, 791 F.2d 385 (5th Cir., 1986), and probably the Tenth Circuit (*Plowman v. United States*, 659 F.Supp. 34 (W.D. Okl., 1986) on the other hand.

The Court of Appeals for the Eleventh Circuit, although urged to do so by Petitioners, refused to reconsider its position in *Ewing and Thomas P.A. v. Heye*, 803 F.2d 613 (11th Cir., 1986). The Court's position was that the deter-

minative factors in the grant of attorney's fees to a prevailing party was the government's "in-court" litigation positions.

Numerous taxpayers throughout the United States are left without clear guidance by the Supreme Court, and conflicts exist between the various Circuits. Therefore, the interpretation of 26 U.S.C. § 7430 is unevenly applied and recovery of attorney's fees is solely dependent upon where a taxpayer resides rather than on the meaning of the statute and the intent of Congress in enacting the statute. Subsequent to the ruling of the Eleventh Circuit in the case of *Ewing & Thomas v. Hewe*, other United States District Court and Circuit Courts of Appeal have followed the decisions of the First and Fifth Circuits and held that the position of the government in the administrative stages of a tax case and other disputes with the government is the position to be considered when determining whether or not those persons are entitled to have the District Court consider an award of attorney's fees and costs of litigation. Congress stated in the House Conference Report: "The Committee intends that the cost of preparing and filing the petition or complaint which commences a civil tax action be the first recoverable attorney's fees." This clearly shows the intent of Congress that the taxpayer should recover for legal expenses and attorney's fees from the date of the filing of the complaint to conclusion of the trial. However, in the instant case, the District Court and the Eleventh Circuit erroneously failed to consider the Congressional intent and rulings of the other various district courts and circuit courts. A principal criteria under this Court's consideration of a grant of certiorari is a conflict in the federal courts of appeal. (Rule 171(a), Rules of the Supreme Court, Part D, Jurisdiction on Writ of Certiorari).

In this case, the District Court simply held that the position of the United States in the civil proceeding challenging

the fair market value of the jewels "was not unreasonable" because it "was for the jury to decide the value of the jewels." Thus, the District Court failed to consider the pre-litigation position of the government on the issue of charitable intent and valuation, but also failed to consider the reasonableness of the government's position on valuation.

For the reasons set forth above it is clear that petitioners have been denied due process of law in that both the District Court and the Court of Appeals denied them of their right to attorney's fees contrary to the terms of the applicable statute and congressional intent, and without findings of fact or citation of authority.

#### **ARGUMENT AND CITATION OF AUTHORITY**

I. The trial court erroneously interpreted Section 7430 of the Code by failing to determine the reasonableness of the government's position throughout the entire proceeding on the taxpayers alleged lack of charitable intent.

In 1982, Congress enacted Section 7430 of the Code authorizing an award of reasonable litigation fees and costs for taxpayers who "substantially prevail" in tax cases in any federal court. The taxpayer must show that the position of the Internal Revenue Service was "unreasonable" and that they "substantially prevailed" with respect to the amount or issues in controversy. Section 7430(c)(2).

Petitioners assert that they established the requirements of Section 7430 at the District Court level because they exhausted their administrative remedies (stipulated in the Pretrial Order) and substantially prevailed in the case.

The District Court held in its Order of March 12, 1987 that the "position of the United States in the civil proceeding"



challenging the fair market value of the jewels was not unreasonable because "it was for the jury to decide the value of the jewels." (R2-32-2.) The District Court viewed the government's only defense since the inception of the proceedings to be the challenge of the fair market value of the jewels. *However, as shown by the government's answer and pretrial order, the government challenged the lack of charitable intent on the part of the taxpayers from 1978 until the date of trial.*

The District Court made no specific findings of fact or conclusions of law on any issues. However, the District Court erred and the Court of Appeals erred. The District Court made no findings of fact or conclusions of law on the issue of the reasonableness of the government's position on donative intent. The Court of Appeals refused to consider the legal issues in the case, apparently silently resting on their decision in *Ewing and Thomas, P. A. v. Heye*, 803 F.2d 613 (11th Cir., 1986). In the case of *Berks v. United States*, 825 F.2d 1262 (8th Cir., 1987), the Circuit Court held this omission to be reversible error:

Although both parties have attempted to interpret the district court's holding and supply their versions of the relevant facts and law either supporting or contradicting the holding, we cannot be guided by such interpretations in the absence of express findings by the district court; it is the district court that has the sole responsibility to make findings of fact and conclusions of law supporting its decision.

The government did not retain an expert until February of 1986; did not use the expert to examine the gems until November of 1986; and did not receive an opinion of the



expert until December 2, 1986 (Vol. 4, 232; 236). The Internal Revenue Service never considered the fair market value of the gems in December of 1978, but only looked at the cost of twelve gems in 1977 (see RAR page 15), and denied Taxpayers' deduction based on a lack of charitable intent. Taxpayers respectfully submit that the District Court erred as a matter of law when it did not examine the reasonableness of the position of the United States in the civil proceedings challenging the Taxpayers lack of charitable intent. Further, Petitioners submit that had the District Court examined this position of the government as directed by Section 7430, it would have found the position was unreasonable even after the date that the Plaintiffs filed their Petition.

Petitioners believe the difficulty in interpreting Section 7430 stems from ignoring the simplicity of the code section. Petitioners contend that a solution to the problem of determining the "position of the United States in a civil proceeding" can only be answered after answering the following five questions: (1) How is the term "civil proceeding" defined? (2) Can the United States assert or maintain more than one position in the "civil proceeding"? (3) Does Section 7430 allow the court to view the pre-litigation agency action of the Internal Revenue Service, if necessary, to help determine what position the United States is asserting in the civil proceeding when that position is vague or ambiguous? (4) Does Section 7430 allow the court to examine the Internal Revenue Service agency action or position when determining whether the position of the United States is unreasonable? (5) Having determined what the positions of the government are to be examined for reasonableness under Section 7430(c)(2)(a)(i), if more than one, what standard should a court employ to determine whether a position is unreasonable.

I. The term "civil proceeding" is not defined in Section 7430. The Fifth Circuit in *Powell v. Commissioner*, 791 F.2d 385 (5th Cir., 1986), defined a "civil proceeding" to encompass the entire tax matter between the government and the taxpayer starting with action taken by the Internal Revenue Service and ending with the action or position taken by the government's attorney if the dispute required a suit to be filed. In their effort to define precisely what a "civil proceeding" encompasses or refers to, and in the absence of a precise statutory definition, courts have reviewed the legislative history of Section 7430, looked to prior decisions under the Equal Access to Justice Act, and examined Section 7430 as a whole.

However, in *Ewing and Thomas, P.A. v. Heye*, as in the case *sub judice*, the Eleventh Circuit was presented with the question as to whether the "civil proceeding" encompassed both the administrative agency proceedings of the Internal Revenue Service and the post petition proceedings with the government's attorneys or only the post petition proceedings. The court in *Ewing* cited *Baker v. Commissioner*, 787 F.2d 637 (D. C. Cir. 1986), and *U. S. v. Balanced Financial Management*, 769 F.2d 1440 (10th Cir. 1985), for the proposition that "the position of the United States which must be examined is the government's in-court litigating position", which implies that the "civil proceeding" means only the proceedings between the government's attorneys and the taxpayer and only in the courtroom and before the judge. Such a definition is totally contrary to the language and intent of Section 7430 and is not the definition of "civil proceeding" used by the court in *Baker* and *Balanced Financial Management*.

The court in *Balanced Financial Management* stated at the last page of its opinion that "the position of the United States means the arguments relied upon by the Government

in litigation" and the court in *Baker* stated, at p. 644, that a civil proceeding "was commenced by Baker's Petition." Thus, a careful reading of *Baker* and *Balanced Financial Management* shows that neither court defined "civil proceeding" to include only the actual time in the courtroom, but interpreted "civil proceeding" to mean the litigation position between the government's attorneys and taxpayer. Further support for equating "litigation" with the entire post-petition proceeding is found in *Black's Law Dictionary* which defines "litigation" as a "judicial controversy" or "suit at law". In fact, *Ashburn v. United States*, 740 F.2d 843 (11th Cir., 1984), *Eidson v. United States*, 53 AFTR2d 84-841, and *Zielinski v. United States*, 54 AFTR2d 84-5132, all cited by the government defined "civil proceeding" to mean the post petition proceedings, i.e., the litigation phase of the dispute.

Next, a review of Section 7430 and its legislative history clearly shows that "civil proceeding" should not be strictly defined to encompass only the "in-court litigating" proceedings, but at a minimum should refer to the proceedings after the petition has been filed in-court. First, 7430(a) refers to a "civil proceeding" as one being brought in a court of the United States. Second, the conference committee report notes that Section 7430 "applies to civil tax litigation, including U.S. Tax Court cases . . ." H. R. Conf. Rep. No. 760, 97th Cong., 2nd Sess. 687, reprinted in 1982 U.S. Code Cong. & Ad News 1190, 1450. Third, when considering what costs could be recoverable under Section 7430, Congress stated:

Recoverable litigation costs include only the reasonable amount of costs which are incurred in the litigation of a civil tax action or proceeding. \* \* \* The committee intends that the costs of preparing and filing the petition or complaint which commences a

*civil tax action be the first of any recoverable attorney's fees. Fees paid or incurred for the services of an attorney during the administrative stages of the case could not be recovered under an award of litigation costs. [Emphasis added.]*

It should be noted that Rule 3 of the Federal Rules of Civil Procedure states that a civil action begins once the petition is filed. Thus, all three statutory references explicitly or implicitly define the civil proceeding at a minimum to encompass those proceedings after the petition has been filed and no where lend support for the proposition that it should mean only an "in-court" proceeding.

II. Having defined the scope of the "civil proceeding" under Section 7430 to include the entire tax matter or at a minimum, the legal proceedings which commence with the filing of a petition, the next question that a Court must answer before awarding costs under Section 7430 is whether the United States, through its attorneys, has taken or asserted more than one position in the "civil proceeding". Before identifying what positions were taken by the United States in the "civil proceeding" in the case *sub judice*, it should be noted that the government has either two or three opportunities to assert positions in tax controversies depending on the breadth of the definition of the term "civil proceeding". If a Court holds that the "civil proceeding" refers to the entire tax matter, then the government can assert positions during the time period encompassing the Internal Revenue Service administrative agency proceeding, it can assert other positions after the petition is filed commencing the litigation proceedings, and finally, it can assert positions during the "in-court litigating" phase. If the Court restricts "civil proceeding" to mean only the post petition proceedings,

then the government not only has the opportunity to advance positions during that time period after the petition has been filed but before the case goes to the courtroom, and during that time period once the parties are finally "in-court litigating". Obviously, the United States may maintain a single position or legal theory throughout the "civil proceeding" or it may assert many positions or legal theories throughout the "civil proceeding"; adding and abandoning such positions or theories through pretrial order, consent orders, and stipulations.

Because the District Court in the case *sub judice*, and the Eleventh Circuit in *Ewing*, narrowly defined the term "civil proceeding" to include only the "post-petition litigating" proceeding, they precluded any finding that it is possible for the government to assert multiple positions or legal theories once the "civil proceedings" commence and then abandon weak positions or theories once the "civil proceeding" goes "in-court". However, three cases have explicitly recognized the possibility that the government may maintain a position during the "civil proceeding" before the "in-court litigating" period are *Baker v. Commissioner*, *Lindt v. U. S.*, 58 AFTR 2d 86-6189, and *Kaufman v. Egger*, 758 F.2d 1 (1st Cir., 1985).

The case *sub judice* vividly illustrates how the government through its attorneys can assert different positions during the "civil proceeding" using the restrictive definition of "civil proceeding" to mean post petition proceeding. Review of the record below shows that one of the government's positions in the "civil proceeding" was that taxpayers failed to qualify for a Section 170 charitable deduction because the taxpayer lacked the requisite charitable intent and took no informed position as to fair market value until December 8, 1986. This position of the United States in the "civil proceeding" is evidenced by the government's answer at Paragraph 8, Paragraph 15 of the Pretrial Order, and Defendant's

position in the pretrial, and its failure to obtain an expert's opinion as to value until December 2, 1986.

This position challenging taxpayers charitable intent was then conceded by the United States when it entered a stipulation with taxpayer the day of trial (Appendix).

Taxpayers urge that the government's position at least after the filing of the Petition was unreasonable in that the government asserted as its primary defense the taxpayers' lack of charitable intent. Thus, taxpayer asks this Court to adopt the view of the *Baker*, *Lindt*, and *Kaufman* courts and recognize that the United States can have a position in the "civil proceeding" even though the position is not advanced at trial. The District Court's order and the Eleventh Circuit's affirmance flie in the face of Congress' desire that Section 7430 of the Code is to encourage the government to settle cases, rather than litigate them.

III. An examination of the facts of this case and the legal precedents dealing with Section 170, as directed by the legislative history of Section 7430, plainly shows that the "position of the United States in the civil proceeding" was unfounded and unreasonable. Prior case law reveals that the Internal Revenue Service has challenged the presence of a taxpayer's charitable intent only when the taxpayer received something of value in exchange for his contribution. *William A. Saba*, ¶ 80 P-H Memo T.C. 80,199 and *DeWitt v. U.S.*, 204 Ct. Cl. 274, 33 AFTR 74-1121. In *DeWitt*, the court held that receipt of a tax benefit is not to be considered as a valuable consideration received back in a quid pro quo exchange which would invalidate a charitable contribution under Section 170. Thus, because taxpayers received nothing more than a tax deduction for the contribution of gems to the Smithsonian Institute, the assertion that taxpayers lacked charitable intent is not supported by legal precedent. Further, because the law concerning a taxpayer's charitable



intent is well-settled, the government should not be allowed to assert such a position in hopes of setting new precedent, or forcing a taxpayer to settle with the government. See *Don Casey Co.*, ¶87 TC.54.

The asserted position by the government during the "civil proceeding" of lack of charitable intent, and its failure to obtain the opinion of an expert smacks of negligence, unreasonableness, and perhaps bad faith. The government's attorneys apparently thought that taxpayers would not challenge the refund denial by the Internal Revenue Service when it continued to assert the untenable position that taxpayers' lacked charitable intent. Surprised that taxpayers intended to challenge the government's position, the government finally dropped their position as to charitable intent, and adopted the issue of fair market value when it obtained the opinion of the expert on December 2, 1986 of a fair market value substantially less than the value claimed by the taxpayer. Then it stipulated on the day of trial that the sole issue was the fair market value of the gems. The government continued to also assert an unreasonable position on the issue of value by contending that the gemstones only had a value of approximately one-half of their cost (R2-25 Defendant Exhibit #5). Unbelievably, the government called Mr. Saul for cross-examination and tried to examine him on the issue of donative intent, but the District Court sustained the objections thereto.

### CONCLUSION

Because the Court of Appeals and the District Court failed to consider the reasonableness of the Respondents position on the issue of donative intent and failed to make findings of fact and conclusions of law, or even consider the issues in their opinion, the lower courts should be reversed and the Eleventh Circuit's decision in *Ewing* and

*Thomas, P. A. v. Heye*, reconciled with the contrary opinions  
in the First, Fifth and Tenth Circuits.

Respectfully submitted,

By: Lemuel Hugh Kemp  
Lemuel Hugh Kemp,  
Georgia Bar Number 413500

By: H. Greely Joiner Jr.  
H. Greely Joiner, Jr.  
Georgia Bar Number 397300

ATTORNEYS FOR PETITIONERS

KINNEY, KEMP, PICKELL,  
SPONCLER & JOINER  
P.O. Box 398  
Dalton, Georgia 30720  
(404) 278-5211  
LHK-T225



## APPENDIX



APPENDIX  
TABLE OF CONTENTS

	Page
APPENDIX A	
Copy of unpublished order of the United States District Court for the Northern District of Georgia. ....	1A
APPENDIX B	
Copy of per curiam opinion of the Court of Appeals for the Eleventh Circuit affirming the District Court order. ....	5A
APPENDIX C	
Copy of order denying the motion for rehearing and motion for a rehearing en banc. ....	7A
APPENDIX D	
Statutes .....	9A
APPENDIX E	
Complaint .....	13A
APPENDIX F	
Answer .....	17A
APPENDIX G	
Stipulation of the Parties .....	21A



1A

APPENDIX A

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ROME DIVISION

CIVIL ACTION NUMBER C85-357R

HARRY I. SAUL, Individually  
and as Executor of the Estate of  
HELEN M. SAUL,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

FILED IN CLERK'S OFFICE  
U.S.D.C. • Rome  
MAR 12 1987  
LUTHER D. THOMAS, Clerk  
By: s/ D Davis  
Deputy Clerk  
(stamp)

ORDER

This case is before the Court on defendant's motion for judgment notwithstanding the verdict, or in the alternative for a new trial; plaintiff's request for reasonable litigation costs; defendant's objection to plaintiff's bill of costs; and plaintiff's motion to modify judgment.

The Court has carefully considered the motion for judgment notwithstanding the verdict, or in the alternative for a new trial and each ground set out in the motion alleging error. Upon consideration of the motion, the brief in support thereof and the response of plaintiff to the motion, the Court concludes that the motion is without merit. Therefore, defendant's motion for judgment notwithstanding the verdict, or in the alternative for a new trial is DENIED.

Pursuant to 26 U.S.C. § 7430, plaintiff moves the Court to award him the reasonable litigation costs he has incurred in this case.

Section 7430 permits courts, in their discretion, to award reasonable litigation costs (including attorney's fees) to any party who is determined to be the prevailing party in a civil proceeding brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty. In order to be entitled to recover such costs, Section 7430(c)(2)(A)(i) provides that a plaintiff must establish that the position of the United States in the civil proceeding was unreasonable.

While agreeing that plaintiff did receive a jury verdict in his favor in this case, the Court is unwilling to hold that the defendant's position was unreasonable. Specifically, the Court concludes that it was for the jury to decide the value of the jewels. The defendant's contention that the jewels had a value substantially less than what the plaintiff claimed was not unreasonable. The fact that the jury chose to find in plaintiff's favor does not ipso facto mean that defendant's position was unreasonable. Therefore, the Court will DENY plaintiff's request that he be awarded reasonable litigation costs.

Also before the Court is defendant's objection to the bill of costs filed by plaintiff on December 22, 1986. Defendant contends that the deposition of Eli Rosen was not "necessarily obtained for use in the case" as required by 28 U.S.C. § 1920. The Court does not agree. Mr. Rosen was an expert witness for the government who testified at trial. Since his deposition was taken one day before the trial was to begin, the cost for the expedited transcript was reasonable and necessary. Accordingly, the Court holds that the costs of Mr. Rosen's deposition and expedited transcript are proper taxable items. Defendant's objection to plaintiff's bill of costs is without merit.

Finally, plaintiff moves the Court to modify the judgment entered on December 9, 1986. Defendant agrees that the judgment was entered in error. Counsel for defendant has recently provided the correct liability of the United States based upon the jury's verdict of December 9, 1986. Therefore, plaintiff's motion to modify the judgment is GRANTED. The Judgment is amended to state the following:

IT IS ORDERED ADJUDGED that the Plaintiff, Harry I. Saul, recover of the Defendant, United States of America, the sum of Ninety Three Thousand Eight Hundred and Two Dollars and Forty Four Cents (\$93,802.44), plus interest accruing from December 9, 1986, as prescribed by 28 U.S.C. Section 2411.

ACCORDINGLY, defendant's motion for judgment notwithstanding the verdict, or in the alternative new trial is DENIED; plaintiff's request for reasonable litigation costs is DENIED; defendant's objection to plaintiff's bill of costs is without merit; and plaintiff's motion to modify the judgment is GRANTED.

**4A**

**IT IS SO ORDERED, this the 12th day of March, 1987.**

**s/s Harold L. Murphy  
UNITED STATES DISTRICT JUDGE**



5A

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

---

No. 87-8335

---

D.C. Docket No. 85-357

HARRY I. SAUL, Individually and as  
Executor of the Estate of HELEN M. SAUL,  
JULIAN D. SAUL, Co-Executor of the Estate  
of HELEN M. SAUL,  
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,  
Defendant-Appellee.

---

Appeals from the United States District Court for the  
Northern District of Georgia

---

DO NOT  
PUBLISH  
(stamp)

(December 7, 1987)

Before HILL and FAY, Circuit Judges, and ALLGOOD\*,  
Senior District Judge.

**PER CURIAM: AFFIRMED.** See 11th Cir. R. 36-1.

“Costs taxed against defendant-appellant.”

---

\*Honorable Clarence W. Allgood, Senior U.S. District Judge  
for the Northern District of Alabama, sitting by designation.

Judgment Entered: December 7, 1987  
For the Court: Miguel J. Cortez, Clerk

By: s/s Karleen McNabb  
Depty Clerk

ISSUED AS MANDATE: FEB 1 1988

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

---

No. 87-8335

---

D.C. Docket No. 85-357

HARRY I. SAUL and JULIAN D. SAUL, as  
Co-Executors of the Estate of  
Helen M. Saul, Plaintiff-Appellant,

V.

UNITED STATES OF AMERICA, Defendant-Appellee.

---

Appeals from the United States District Court for the  
Northern District of Georgia

---

(January 19, 1988)

Before HILL and FAY, Circuit Judges, and ALLGOOD\*,  
Senior District Judge

---

\* Honorable Clarence W. Allgood, Senior U.S. District Judge  
for the Northern District of Alabama, sitting by designation.

**8A**

The Petition for Rehearing and for an En Banc Hearing is denied.

ISSUED AS MANDATE: January 19, 1988

APPENDIX D

Statutes

26 U.S.C. § 170.

“(a) Allowance of Deduction.

(1) General rule. There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary.”

“(c) Charitable Contribution Defined. For purposes of this section, the term ‘charitable contribution’ means a contribution or gift to or for the use of—

(1) A state, a possession of the United States, or any political subdivision of any of the foregoing, or the United States, or the District of Columbia, or any possession of the United States;

(2) A corporation, trust or community chest, fund, or foundation—

(A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or

international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals;

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(D) which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements) any political campaign on behalf of (or in opposition to) any candidate for public office.

A contribution or gift by a corporation to a trust, chest, fund, or foundation shall be deductible by reason of this paragraph only if it is to be used within the United States or any of its possessions exclusively for purposes specified in subparagraph (B). Rules similar to the rules of section 501(j) shall apply for purposes of this paragraph.

(3) A post or organization of war veterans, or an auxiliary unit or society of, or trust or foundation for, any such post or organization—

(A) organized in the United States or any of its possessions, and

(B) no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(4) In the case of a contribution or gift by an individual, a domestic fraternal society, order, or association, operating under the lodge system, but only if such contribution or gift is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals.

(5) A cemetery company owned and operated exclusively for the benefit of its members, or any corporation charged solely for burial purposes as a cemetery corporation and not permitted by its charter to engaged in any business not necessarily incident to that purpose, if such company or corporation is not operated for profit and no part of the net earnings of such company or corporation inures to the benefit of any private shareholder or individual.

For purposes of this section, the term 'charitable contribution' also means an amount treated under subsection (g) as paid for the use of an organization described in paragraph (2), (3), or (4)."

26 U.S.C. § 7430(c)(2)(A).

"(a) General. In the case of any civil proceeding which is—

(1) brought by or against the United States in connection with the determination, collection or refund of any tax, interest or penalty under this title, and

(2) brought in a court of the United States (including the Tax Court and the United States Claims Court),

the prevailing party may be awarded a judgment for reasonable litigation costs incurred in such proceeding."

**"1. Prevailing Party.**

(A) In general. The term "prevailing party" means any party to any proceeding described in subsection (a) (other than the United States or any creditor of the taxpayer involved) which

(i) establishes that the position of the United States in the civil proceeding was unreasonable, and

(ii)(I) has substantially prevailed with respect to the amount in controversy, or

(II) has substantially prevailed with respect to the most significant issue or set of issues presented."



13A

APPENDIX E

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ROME DIVISION

CIVIL ACTION  
FILE NUMBER: C85 357 R

HARRY I. SAUL, INDIVIDUALLY and  
AS EXECUTOR OF THE ESTATE OF  
HELEN M. SAUL,

Plaintiff,

VS.

UNITED STATES OF AMERICA,

Defendant.

FILED IN CLERK'S OFFICE  
U.S.D.C. • Rome  
NOV -6 1985  
LUTHER D. THOMAS, Clerk  
By: s/s D Davis  
Deputy Clerk  
(stamp)

COMPLAINT

Now comes plaintiff, Harry I. Saul, Individually and as Executor of the Estate of Helen M. Saul against the United States of America as defendant and shows to the Court as follows:

14A

-1-

This is a complaint for a tax refund and the Court has jurisdiction pursuant to 26 U.S.C. § 74-22.

-2-

Plaintiff has complied with all conditions precedent to the filing of this complaint.

-3-

The United States of America is subject to the jurisdiction of this Court and this action may be maintained against the United States of America pursuant to law.

-4-

By notice dated August 23, 1984, the Taxpayers was assessed an additional tax as set forth in the attached Exhibit "A" for taxable years 1978 and 1979, in the amounts of \$26,013.71 and \$15,762.83 respectively.

-5-

On or about January 18, 1985, the Taxpayers paid the additional tax assessed pursuant to the Commissioner's notice of deficiency and filed contemporaneously therewith a claim for refund for taxable years 1978 and 1979 pursuant to the attached Exhibit "B" in the amounts of \$24,389.22 for taxable year 1978, and \$15,824.82 for taxable year 1979.

-6-

On or about January 18, 1985, the Taxpayers received the Commissioner's notice of assessment and paid on or about

January 24, 1985, the additional interest assessed for taxable years 1978 and 1979 in the amounts of \$23,124.71 and \$12,549.02 respectively, and contemporaneously therewith filed a claim for refund pursuant to the attached Exhibit "C".

-7-

Taxpayers' refund claims for taxable years 1978 and 1979 were timely filed and were denied by the Commissioner by letter dated May 28, 1985, a copy of which is attached hereto as Exhibit "D".

-8-

Said refund claims are based on the Commissioner's refusal to accept as correct the Taxpayer's appraised fair market value of its charitable contributions under Section 170 of the Internal Revenue Code of 1954, as amended ("Code"), and the interest assessed by the Commissioner under the Code.

-9-

The Taxpayers have established the fair market value of their charitable gifts in the amounts of \$44,757.72 and \$30,864.93 for taxable years 1978 and 1979 is correct and that their contribution of the gem to The Smithsonian Institute in December of 1978 met the requirements of Section 170 of the Code.

WHEREFORE, plaintiff prays that process issue and the plaintiff recovery of the defendant the sum of \$41,776.54 plus lawful interest, reasonable attorney's fees and such other relief as plaintiff may be entitled to under the facts.

This 4 day of November, 1985.

KINNEY, KEMP, PICKELL,  
SPONCLER & JOINER

BY: s/s H. Greely Joiner, Jr.  
H. GREELY JOINER, JR.  
STATE BAR NUMBER: 397300

BY: s/s I. Hugh Kemp, P.C.  
L. HUGH KEMP, P.C.  
STATE BAR NUMBER: 413500  
ATTORNEY FOR PLAINTIFF

P. O. Box 398  
Dalton, Georgia 30722-0398  
(404) 278-5211

Plaintiff demands a trial by jury of all issues of fact.

lhk/r2-4

17A

APPENDIX F

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ROME DIVISION

CIVIL ACTION NO. C85-357R

HARRY I. SAUL, Individually  
and as Executor of the Estate  
of Helen M. Saul,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

FILED IN CLERK'S OFFICE  
U.S.D.C. • Rome  
JAN 13 1986  
LUTHER D. THOMAS, Clerk  
By: s/s V. VanLavedeigh  
Deputy Clerk  
(stamp)

A N S W E R

Comes now the defendant, United States of America, by and through the undersigned counsel, and responds as follows to the Complaint.

18A

1.

Denies the allegations contained in paragraph 1 of the Complaint except admits that the Complaint is an complaint for a tax refund, and avers that the Court has jurisdiction pursuant to 26 U.S.C. § 7422.

2. - 4.

Admits the allegations contained in paragraphs 2 through 4 of the Complaint.

5.

Admits the allegations contained in paragraph 5 but denies each and every allegation contained in Exhibit "B" unless otherwise admitted in this Answer.

6.

Admits the allegations contained in paragraph 6 but denies each and every allegation contained in Exhibit "C" unless otherwise admitted in this Answer.

7.

Admits the allegations contained in paragraph 7 of the Complaint.

8.

Admits the allegations contained in paragraph 8 of the Complaint, and avers that the Commissioner of Internal Revenue also determined that the plaintiff's purported charitable contributions were not deductible pursuant to Section 170 of the Internal Revenue Code.

Denies the allegations contained in paragraph 9 of the Complaint.

Wherefore, defendant United States of America prays as follows:

1. That this Court determine and adjudge that the plaintiff take nothing by his Complaint and said Complaint be dismissed with prejudice.

2. That this Court grant the United States such other relief as the Court deems proper, including costs herein.

LARRY D. THOMPSON  
United States Attorney

SHARON DOUGLAS STOKES  
Assistant United States Attorney  
Georgia Bar # 227475

By: s/s Ann Ried (by express permission  
ANN REID Joy Pritts)  
Ga. Bar # 112425  
Trial Attorney, Tax Division  
Department of Justice  
Washington, D.C. 20530  
Telephone: (202) 724-6515  
(FTS) 724-6515

**CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED that service of the foregoing Answer, has this 10th day of January, 1986, been made on the following, by depositing a copy thereof, postage prepaid, in the United States mail addressed to:

L. Hugh Kemp, P.C.  
Kinney, Kemp, Pickell, Sponcler,  
and Joiner  
P. O. Box 398  
Dalton, Georgia 30722-0398

s/s Joy Pritts  
Trial Attorney, Tax Division  
Department of Justice  
Washington, D.C. 20530



21A

**APPENDIX G**

**IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF GEORGIA  
ROME DIVISION**

**CIVIL NO. C85-357R**

**HARRY I. SAUL, et al.,**

**Plaintiffs,**

**v.**

**UNITED STATES OF AMERICA,**

**Defendant.**

**FILED IN OPEN COURT  
Luther D. Thomas, Clerk  
DEC 08 1986  
By: s/s T. Stewart  
Deputy Clerk  
(stamp)**

**STIPULATION**

It is hereby stipulated and agreed between the parties:

Plaintiff Harry I. Saul donated 20 gemstones to the Smithsonian Institution on December 31, 1978. The Smithsonian Institution is a charitable organization within the meaning of the Internal Revenue Code. The taxpayers, Harry I. Saul and

Helen M. Saul claimed an itemized deduction of \$44,757.52 on their 1978 joint income tax return based on the charitable donation of gemstones. The taxpayers claimed an itemized deduction of \$30,804.93 on their 1979 income tax return pursuant to a carry-over provision and based on the charitable donation of the gemstones.

The Internal Revenue Service disallowed the deductions for both years and, on January 15, 1985, assessed a tax deficiency against the taxpayers in the amount of \$26,013.71 for 1978, and \$15,762.83 for 1979.

The taxpayers paid the deficiency, plus interest, and properly filed claims for refund. The Internal Revenue Service disallowed their claims for refund. Plaintiffs timely filed this lawsuit seeking a tax refund for taxes and interest paid based on the Internal Revenue Service's disallowance of the charitable donation deduction of the gemstones. The only issue to be determined by the jury is the fair market value of the gemstones at the time of the donation.

s/s Hugh Kemp  
L. HUGH KEMP  
Counsel for Plaintiffs  
Ga. Bar # 413500  
P. O. Box 398  
Dalton, GA 30722  
(404) 278-5211

s/s Ann Reid  
ANN REID  
Counsel for Defendant  
Ga. Bar # 112425  
Trial Attorney, Tax Div.  
Department of Justice  
P. O. Box 14198  
Benjamin Franklin Station  
Washington, D.C. 20044  
(202/FTS) 272-6494

.....

(2)  
No. 87-1676

Supreme Court, U.S.

FILED

JUN 9 1988

JOSEPH F. SPANIOLO, JR.

CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1987

HARRY I. SAUL, INDIVIDUALLY AND AS EXECUTOR OF THE  
ESTATE OF HELEN M. SAUL, AND JULIAN D. SAUL,  
CO-EXECUTOR OF THE ESTATE OF HELEN M. SAUL,  
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

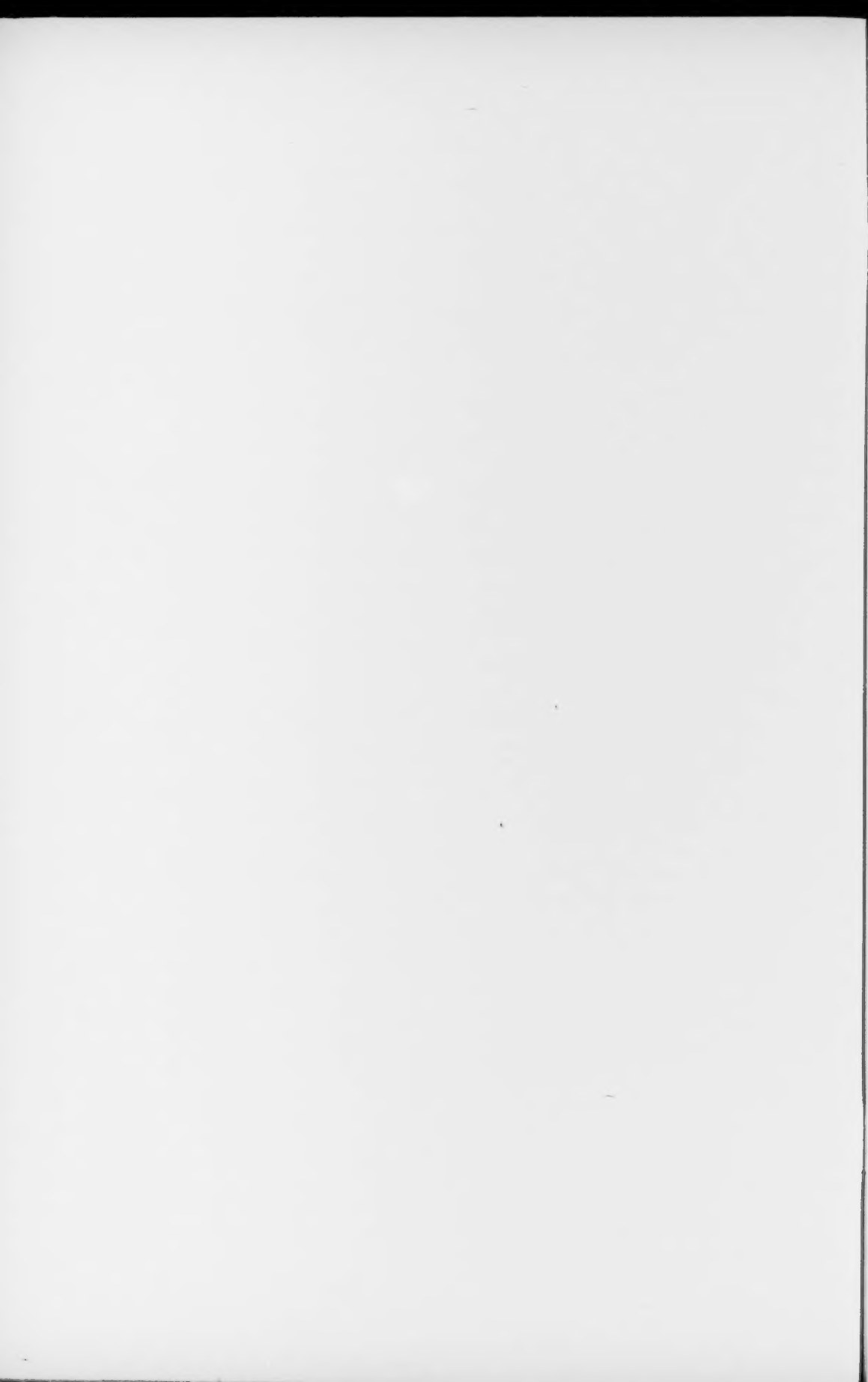
CHARLES FRIED  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*  
*(202) 633-2217*

8 pp



## TABLE OF AUTHORITIES

Cases:	Page
<i>Anselmo v. Commissioner</i> , 80 T.C. 872 (1983), aff'd, 757 F.2d 1208 (11th Cir. 1985) .....	5-6
<i>Baker v. Commissioner</i> , 787 F.2d 637 (D.C. Cir. 1986) .....	4
<i>Estate of Kaplin v. Commissioner</i> , 748 F.2d 1109 (6th Cir. 1984) .....	6
<i>Ewing &amp; Thomas, P.A. v. Heye</i> , 803 F.2d 613 (11th Cir. 1986) .....	4
<i>Kaufman v. Egger</i> , 758 F.2d 1 (1st Cir. 1985) .....	3
<i>Orth v. Commissioner</i> , 813 F.2d 837 (7th Cir. 1987) ..	6
<i>Powell v. Commissioner</i> , 791 F.2d 385 (5th Cir. 1986) ..	3
<i>Sliwa v. Commissioner</i> , 839 F.2d 602 (9th Cir. 1988) ..	3
<i>United States v. Balanced Financial Mgmt., Inc.</i> , 769 F.2d 1440 (10th Cir. 1985) .....	4
<i>Wickert v. Commissioner</i> , 842 F.2d 1005 (8th Cir. 1988) ..	3-4
Statutes:	
Internal Revenue Code of 1954 (26 U.S.C.):	
§ 170(e) .....	1
§ 170(e)(1)(A) .....	1
§ 1222 (Supp. 1 1977) .....	2
§ 7430 .....	2, 3, 4
§ 7430(c)(2)(A)(i) .....	3
§ 7430(c)(4) .....	4
Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085:	
§ 1551(e), 100 Stat. 2753 .....	4
§ 1551(h), 100 Stat. 2753 .....	4



# In the Supreme Court of the United States

OCTOBER TERM, 1987

---

No. 87-1676

HARRY I. SAUL, INDIVIDUALLY AND AS EXECUTOR OF THE  
ESTATE OF HELEN M. SAUL, AND JULIAN D. SAUL,  
CO-EXECUTOR OF THE ESTATE OF HELEN M. SAUL,  
PETITIONERS

v.

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO  
TO THE UNITED STATES COURT OF APPEALS FOR  
THE ELEVENTH CIRCUIT*

---

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

---

Petitioners contend that the courts below erred in denying their request for litigation costs and attorney's fees under Section 7430 of the Internal Revenue Code.<sup>1</sup>

1. On December 2, 1977, Harry I. Saul and Helen M. Saul (the taxpayers) purchased 20 gemstones for \$14,616 (DX 2). The next day the taxpayers lent the gemstones to the Smithsonian Institution's National Museum of Natural History (Tr. 15). On December 31, 1978, after the holding period specified by Section 170(e) had expired,<sup>2</sup> the tax-

---

<sup>1</sup> Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code).

<sup>2</sup> Section 170(e)(1)(A) of the Code provides that the amount of a charitable contribution deduction resulting from the donation of appreciated "capital gain property" is reduced by the amount of gain that would not have been long-term capital gain if the property contributed had been sold at its fair market value. The effect of this provision is to limit the taxpayer's deduction to the amount of his basis, *i.e.*, his cost, unless gain on the sale of the property at the time of the donation



payers donated the gemstones to the Smithsonian (Tr. 22). The taxpayers subsequently claimed on their joint income tax return a charitable deduction in the amount of \$75,623 for this donation. The Commissioner of Internal Revenue thereafter issued a notice of deficiency in which he disallowed the claimed deduction on two alternative grounds: (1) that the taxpayers had failed to establish that the fair market value of the gemstones was \$75,623, and (2) that the taxpayers lacked donative intent.

The taxpayers paid the deficiency and brought this refund suit in the United States District Court for the Northern District of Georgia. During the course of pre-trial preparation, the government abandoned the second objection made by the Commissioner in the notice of deficiency, *i.e.*, that the taxpayers lacked the requisite donative intent. Thus, the stipulated pretrial order submitted by the parties stated that the only issue presented was whether the gemstones had a fair market value of \$75,623 when they were donated (see Tr. 23). The issue was tried to a jury, which returned a special verdict finding that the fair market value of the gemstones as of the date they were donated was the amount claimed by the taxpayers (Tr. 318).

Petitioners then moved for an award of litigation costs and fees. The district court denied the motion (Pet. App. 1A-4A). The court concluded that the government's contention that the gemstones had a value substantially less than that claimed by the taxpayers presented a fair issue for determination by the jury and therefore that the position was not "unreasonable" under Section 7430 (Pet. App. 2A).

---

would qualify for long-term capital gain treatment. Because the holding period to qualify for long-term capital gain treatment in 1978 was one year (see 26 U.S.C. (Supp. I 1977) 1222), petitioners were required to hold the property for at least that long in order to take a deduction for any claimed appreciation.

The court of appeals summarily affirmed in a one-line order (*id.* at 5A-6A).

2. Petitioners contend (Pet. 7-15) that the court of appeals erred in affirming the district court's denial of the request for attorney's fees. Petitioners maintain that the source of the courts' error is their failure to look at the reasonableness of the government's administrative position, instead focusing only on the reasonableness of the government's litigating position. Petitioners urge that the Court should grant certiorari to resolve a conflict in the circuits on this dispute over the proper interpretation of Section 7430. This contention is without merit for two reasons. First, the conflict asserted by petitioners has been resolved by Congress for cases commenced after December 31, 1985, and thus the question presented in the petition is of little continuing importance. Second, on these facts, petitioners would not be entitled to attorney's fees under either interpretation because the government's administrative position was not unreasonable. Accordingly, there is no reason for review by this Court.

a. Petitioners are correct in stating that there exists a conflict in the circuits in interpreting Section 7430(c)(2)(A)(i) of the Code, as applicable to cases commencing before December 31, 1985. That subsection provides that attorney's fees may be recovered under Section 7430 only by a party who "establishes that the position of the United States in the civil proceeding was unreasonable." Three circuits have held that the "position of the United States in the civil proceeding" includes the IRS's administrative position. *Sliwa v. Commissioner*, 839 F.2d 602, 607 (9th Cir. 1988); *Powell v. Commissioner*, 791 F.2d 385, 391-392 (5th Cir. 1986); *Kaufman v. Egger*, 758 F.2d 1, 4 (1st Cir. 1985). Four other circuits have held, however, that the "position" whose reasonableness is to be analyzed is only the government's litigating position in court. *Wickert v. Commissioner*, 842

F.2d 1005, 1008 (8th Cir. 1988); *Ewing & Thomas, P.A. v. Heye*, 803 F.2d 613, 615-616 (11th Cir. 1986); *Baker v. Commissioner*, 787 F.2d 637, 641-642 (D.C. Cir. 1986); *United States v. Balanced Financial Mgmt., Inc.*, 769 F.2d 1440, 1450 (10th Cir. 1985).<sup>3</sup>

This conflict was definitively resolved by Congress in the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085. Section 1551(e) of that legislation amended Section 7430 of the Code to provide an express definition of the phrase "position of the United States." See 100 Stat. 2753. Section 7430(c)(4), which was made applicable to cases commenced after December 31, 1985 (see § 1551(h), 100 Stat. 2753), now provides:

**Position of United States**—The term "position of the United States" includes—

(A) the position taken by the United States in the civil proceeding, and

(B) any administrative action or inaction by the District Counsel of the Internal Revenue Service (and all subsequent administrative action or inaction) upon which such proceeding is based.

Thus, the question presented in this case is relevant only to a dwindling number of cases commenced prior to 1986,<sup>4</sup> and there is no reason for this Court to resolve it.

b. In any event, application of the interpretation sought by petitioners would not assist their cause because the administrative position of the IRS in this case was reasonable.

---

<sup>3</sup> Petitioners err in stating (Pet. 10) that the Eleventh Circuit's rule is that only the proceedings "in the courtroom and before the judge" are to be examined for reasonableness. The rule requiring examination of the litigating position of the United States encompasses all proceedings after the petition or complaint is filed. See *Ewing & Thomas, P.A. v. Heye*, 803 F.2d at 614.

<sup>4</sup> The instant case was commenced on November 6, 1985.

Petitioners do not appear to dispute the conclusion of the district court that the Commissioner acted reasonably in maintaining his principal challenge to the claimed deduction, namely, that the fair market value of the donated gemstones was less than \$75,623. The Commissioner's objection on that point was plainly reasonable inasmuch as petitioners had paid only \$14,616 for the gemstones less than 13 months before they were donated. That objection, in itself, was a sufficient basis for denying the claimed deduction. Moreover, the alternative position advanced by the Commissioner in the notice of deficiency, viz., that petitioners lacked the requisite donative intent, was not unreasonable. The particular circumstances of this case, where the taxpayers "lent" the gemstones to the Smithsonian on the day after they were purchased and then made a "gift" of the stones 12 months later, when the full tax benefits of a donation could first be realized (see note 2, *supra*), gave ample reason to question the true motive underlying the transaction.<sup>5</sup>

Petitioners also erroneously suggest (Pet. 8-9, 14) that the Commissioner acted unreasonably in failing to obtain an expert opinion concerning the value of the gemstones until shortly before the trial. Petitioners acknowledge (Pet. 3) that the Commissioner did value the gems during the course of the administrative proceedings. Moreover, he was entitled to consider the taxpayers' purchase price as probative evidence of the value of the stones when they were donated. See, e.g., *Anselmo v. Commissioner*, 757 F.2d 1208, 1213

---

<sup>5</sup> The Commissioner was well aware that, at the time this deduction was claimed, promoters of tax shelters were marketing gemstones and similar items to taxpayers with the promise that they could donate the stones to museums at exaggerated values and take charitable contribution deductions that would yield tax savings well in excess of the purchase price of the stones. See, e.g., *Anselmo v. Commissioner*, 80 T.C. 872, 873-875 & n.3 (1983), *aff'd*, 757 F.2d 1208 (11th Cir. 1985); Tr. 107-108, 113-118; DX 4.

(11th Cir. 1985); *Estate of Kaplin v. Commissioner*, 748 F.2d 1109, 1111 (6th Cir. 1984). Because a taxpayer bears the burden of establishing his entitlement to a deduction, it was the taxpayers' burden to establish the fair market value of the gemstones when they were donated. See, e.g., *Orth v. Commissioner*, 813 F.2d 837, 841 n.5 (7th Cir. 1987); *Anselmo v. Commissioner*, 757 F.2d at 1211 & n.2. Accordingly, it was quite reasonable for the government to wait until it was apparent that the case was going to go to trial before undertaking to obtain its own expert appraisal.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED  
*Solicitor General*

JUNE 1988

